IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 310

In the Matter of
GRANADA APARTMENTS, INC.,
DEBTOR.

WEIGHTSTILL WOODS, COURT TRUSTEE,
Petitioner,
vs.
CITY NATIONAL BANK AND TRUST COMPANY OF CHICAGO, AND OTHERS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO REVIEW AN OPINION BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT UPON AN APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

PETITION FOR WRIT OF CERTIORARI.
(TO REVIEW APPEAL 7061 IN C. C. A. 7.)
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Appendices at pages 45-50.
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PETITION FOR WRIT OF CERTIORARI.

(To REVIEW APPEAL 7061 IN C. C. A. 7.)

To the Honorable Justices of the Supreme Court of the United States:

Petitioner, Weightstill Woods, as Court Trustee prays the issuance of a writ of certiorari to review the decision of the United States Circuit Court of Appeals

for the Seventh Circuit, rendered March 26, 1940, in cause 7061, which (a) in an appeal taken by your petitioner to enlarge the recovery granted by the District Court by decree of May 2, 1939, reversed the District Court's findings of fact, thereby denying your petitioner's prayer for any recovery, and (b) refused to apply or to determine, whether or not the "Statute of Gloucester" which assesses treble damages in cases of waste, will be enforced.

Refusal of Court to Obey Acts of Congress.

This Circuit Court of Appeals has in other cases misapplied seemingly clear Congressional directions as to the weight to be given the findings of fact of a lower court or administrative body. Thus in *C. G. Conn, Limited* v. *National Labor Relations Board,* 108 Fed. (2d) 390 at 396 (1939) this court said:

> "At this point we pause to make observation that we have serious doubt if we are bound by this finding of the Board, because it amounts to a conclusion, rather than a finding of fact. * * * If this be a correct observation we are not bound to accept it as a finding of fact."

Thus the court decides that a finding of fact is only a finding of fact *if it says so;* the statement of the administrative body or the court below to the contrary notwithstanding. Thus are inroads made by judicial legislation upon the laws of the United States as enacted by the Congress and signed by the President. A similar refusal to adhere to the law and the Constitution is shown herein. For this and other reasons Your Honors should grant certiorari. *National Labor Relations Board* v. *Waterman S. S. Corp.,* 60 S. Ct. 493 at 495 (1940).

STATEMENT AS TO JURISDICTION.

The Opinion by the Circuit Court of Appeals was dated March 26, 1940.[1] Petition for rehearing was denied by the Circuit Court of Appeals on May 7, 1940.[2] The Opinion is reported at 111 Fed. (2d) 834. Mandate was stayed pending this review. Timely application for review by this court is made on August 6, 1940. The petition is presented in accordance with Section 240 (a) of the Judicial Code as amended, and Rule 38 of this court as amended.

The jurisdiction of the District Court over the subject matter is based upon Sections 2 (21), 70 e 3, and 642 of the Bankruptcy Act as amended. The jurisdiction over respondents personally is based upon voluntary application and consent of respondents under Section 23 (b) of said Act. When approving the plan on July 14, 1937, the District Court wrote a special reservation of power in that order as follows:

> "Anything herein contained to the contrary notwithstanding, all expenses of administration in this *or any other court* shall be subject to the approval of this court."

No appeal was taken from said order. It became and remains law of this case. Said sections of the Bankruptcy Act as amended are mere revisions of the prior law. Such verbal changes as were made by the rearrangement do not alter the meaning and will be construed and enforced as a continuation of the prior law.

Granada Apartments, Inc., debtor, was a real estate corporation at Chicago, upon whose hotel property renewed mortgages, totalling $860,000 issued in 1928, were outstanding and widely held throughout the United States when the

1. Printed Record (PR.) 144.
2. PR. 181.

property came into United States District Court in April, 1937, for reorganization under the then 77B proceedings.

Fraudulent Statements in Prospectuses by Which All Bonds Were Sold to the Public.

At the hearings before the District Court, it was definitely shown that there was fraud in the prospectus issued in 1924 and again in 1928, in stating to prospective bondholders that the furniture and equipment of the hotel was part of the security; whereas in fact it was purchased on chattel mortgage and never paid for. The 10 years of litigation which is listed at page XX of this petition, was an effort by the finance houses and their lawyers to escape the proper consequences of the fraud perpetrated in this manner, and to use the current revenue bondholders money to pay for new furniture, and to pay for these litigations which were undertaken to delay creditor suits and suits by wronged bondholders, and possibly to prevent criminal proceedings and jail sentences. From 1932 onward, finance houses and trust companies named in the indentures, successively went into receivership and failed because of their fraudulent ways and bad practices.

Eventually City National Bank and Trust Company of Chicago was appointed (or appointed itself as the District Court found), to assume charge of this property. The same lawyers who now resist the Court Trustee have been party to the whole series of frauds since 1924, and because of that, City National (who retains their services) never attempted to secure the proper account nor any other actual protection from the former trust companies and finance houses. On the contrary they used the current revenues to pay off old junior claims held by their friends operating banks and trust companies about Chicago.

The Bondholders and the Court Trustee, were not made parties to the proceeding in the state court for ap-

pointment of City National as Indenture Trustee, and are not bound by any action in the foreclosure proceedings. *Green* v. *Brophy,* 110 Fed. (2d) 539, 542; *Elliff* v. *Lincoln National Life Insurance Company,* 369 Ill. 408; *National Licorice Company* v. *Labor Board,* 309 U. S. 350 at 362.

Rule 52 of Civil Procedure Ignored.

The findings by the District Court are in the printed record. An original record of several thousand pages filed in the District Court, shows that the proof was thoroughly sifted and was adequately dealt with by the District Judge, who heard the evidence for about a month. That original record in four volumes is here, under (Rule 10(4)) for inspection. The Court of Appeals disregarded Rule 52 of the Rules of Federal Procedure, reversed the District Court, and seeks to bury all these unconscionable transactions.

The refusal by the Court of Appeals to abide by Rule 52 is also a refusal to follow its own recent ruling *In Re Peacock Food Markets, Inc.,* 108 Fed. (2d) 453. That action also is a refusal to follow the ruling by this court in *Case* v. *Los Angeles Lumber Company,* 308 U. S. 106. The adverse action by the Court of Appeals is also an abdication and refusal to perform its duty under Article III, section 2 of the United States Constitution which provides that:

> "The judicial power shall extend to all cases, in law and *equity* arising under the Constitution, *the laws of the United States,* and treaties made, or which shall be made under their authority."

Denial of Due Process to Court Trustee and Granada Debtor.

In exercise of that power and duty, your Honors confirmed and re-enforced the *equity* of the Boyd Case, when you decided *Case* v. *Los Angeles Lumber Company,* 308 U. S. 106. To conform to the Constitution, the Circuit

Court of Appeals should have done likewise in this Granada appeal. This constitutional duty has been stated in this manner:

Noonan v. *Lee*, 67 U. S. (2 Black) 499 at 509:

> "The equity jurisdiction of the courts of the United States is derived from the Constitution and Laws of the United States. Their powers and rules of decision are the same in all the States. Their practice is regulated by themselves, and by rules established by the Supreme Court. This court is invested by law with authority to make such rules. In all these respects they are unaffected by state legislation. *Neves* v. *Scott*, 13 How. 270; *Boyle* v. *Zacharie*, 6 Pet. 658; *Robinson* v. *Campbell*, 3 Wheat. 323."

In the foregoing manner, and by other ways set forth in this petition it is contended that the Circuit Court of Appeals has denied to debtor estate due process contrary to the Fifth Amendment to the Constitution.

In some cases this Circuit Court of Appeals has preached due process of law to certain administrative boards. Such a case was *Inland Steel Co.* v. *National Labor Relations Board*, 109 Fed. (2d) 9 at 20-21, (1940). As is shown by this petition, however, (and petition No. 281-282 also pending before Your Honors) that court has been less careful to award due process of law to litigants before it than it has been when directing others to observe this requirement of the Fifth Amendment to the Constitution which reads:

> "No person shall deprived of * * * property without due process of law."

SUMMARY OF THE MATTER INVOLVED.

In the Trial Court.

Petitioner is the duly appointed Court Trustee[3] in the federal reorganization proceedings of Granada Apartments, Inc., an Illinois real estate hotel corporation, for which charter was issued in 1929.[4] The proceedings are pending in the United States District Court at Chicago, on both voluntary and involuntary petitions filed in April of 1937.[5] A plan of reorganization was proposed, which was confirmed by the District Court on July 14, 1937, by appropriate order, from which no appeal was taken.

The new corporation, Granada Apartments Hotel Corporation, under an Illinois charter issued October 30, 1937, has been operating the reorganized property outside of court since November 1, 1937, pursuant to a conveyance from the Court Trustee as ordered by the District Court on October 22, 1937. The present litigation was excepted from that conveyance, pursuant to an order of court, which directed the Court Trustee to carry it to a conclusion. The entry of final decree in the reorganization proceedings, awaits upon the completion of pending litigation.

For ten years prior to the filing of the reorganization petitions in the District Court, the Granada property had been in several courts because of financial difficulties. These difficulties are evidenced by various litigations (Appendix "A" below at page 45), with consequent expenses and delay in meeting creditors demands. Such delay is fraud. The law of Illinois so provides. (*Weber* v. *Mick*,

3. R. 406, PR. 18.
4. R. 411, PR. 25.
5. R. 406, PR. 18.

131 Ill. 520.) The District Court found that such litigations were started for purposes of delaying, embarrassing and harassing creditors of the Granada estate,[6] and did hinder, defraud and delay such creditors.[7] The findings by the District Court show the detail of those prior litigations. A like case is *Shapiro* v. *Wilgus*, 287 U. S. 348.

Respondent, City National Bank and Trust Company of Chicago, was not named in the Granada bonds indentures. But it voluntarily sought to be and had been appointed successor trustee of the Granada property during foreclosure proceedings in the state court. It remained in possession until the petitioner was given possession on May 17, 1937, by order of the District Court.[8]

On August 30, 1937, respondent, City National Bank and Trust Company of Chicago, filed voluntarily in the reorganization proceedings in the District Court, its report and account as such appointed trustee,[9] to which this petitioner, Court Trustee objected, and made counterclaim,[10] asking that certain items be surcharged.

Counterclaim by Court Trustee.

This counterclaim and objections urged (a) that respondent City National and its counsel had served conflicting and adverse interests in the state foreclosure proceedings[11] and were not entitled to fees, and the District Court so found.[12] (b) That respondent City National had committed waste upon the Granada property[13] and the District Court after hearing the evidence so found.[14] (c)

6. R. 415, PR. 31; R. 417, PR. 34.
7. R. 419, PR. 37.
8. R. 414, PR. 29-30.
9. PR. 52.
10. PR. 68.
11. PR. 69.
12. R. 418-420, PR. 36-38; R. 413, PR. 28-29; R. 414, PR. 30.
13. PR. 70-72.
14. R. 419-420, PR. 37-38.

That damages treble the amount of such waste should be assessed against respondent,[15] and the District Court so found.[16] (d) That respondent City National was a mere trustee *de son tort*, was responsible for its acts, but had no equity to claim payment for services,[17] and the trial court so found.[18] (e) That respondent City National failed to require a full accounting from its predecessor Granada Trustee, for which failure it should be surcharged,[19] and held responsible for, and the District Court found that there had been numerouse instances when the questionable dealings of prior fiduciaries (for a list of these "fiduciaries" see Appendix "B") should have been examined and accounted for.[20] And (f) that respondent City National itself and its attorneys (who had handled the Granada affairs for many years), and other agents knew of these transgressions of the law by these prior parties, but had demanded no accounting, and in some instances they so far departed from fiduciary duties as to aid and abet the completion of illegal schemes and transactions commenced by prior fiduciaries, and that respondent should be held accountable for such acts and failures to act.[21]

More particularly the objections and counterclaim of the petitioner stated that respondent City National and its counsel had wrongfully refused and failed to turn over certain Granada cash funds ($1990.86), pursuant to court

15. PR. 72.

16. R. 419, PR. 38, Par. 54.

17. PR. 72.

18. R. 421, PR. 40-41; R. 419, PR. 38.

19. PR. 74.

20. R. 408-415; PR. 21-31.

21. R. 414, PR. 30-31, par.* 36; R. 412, PR. 27-28, par. 26; R. 413, PR. 28, par. 28; R. 418, PR. 36, par. 48; R. 409, PR. 22, par. 14; R. 409, PR. 23, par. 16; R. 410, PR. 24-25, par. 20; R. 411, PR. 25-26, par. 23; R. 411-412, PR. 24-25; R. 413-414, PR. 29, par. 32; R. 414, PR. 30, par. 35; R. 415, PR. 31, Par. 37; R. 417, PR. 34, par. 44; R. 419, PR. 36-37, par. 50-51; R. 419, PR. 38, par. 54; R. 420, PR. 38, Item 4.

* Paragraph of the trial court's findings.

order of May 17, 1937,[22] and the District Court so found.[23] This is not only a civil wrong, but a criminal act forbidden by Section 29 of the Bankruptcy Act; *U. S.* v. *Shapiro,* 101 Fed. (2d) 375. It was further charged that in 1936, respondent City National without authority had used Granada funds in the amount of $10,186 to pay court costs, fees and legal expenses never earned,[24] and the District Court so found.[25] That the same respondent had, as trustee in possession prior to May 1937, overcharged for management fees,[26] and the District Court so found and determined that this overcharge was $11,365.42.[27] That by reason of collusive conduct in breach of fiduciary and trust duties, respondent City National, did not charge Arlington, Inc., (a neighboring hotel of which respondent City National was also trustee—See Appendix "C") either the contract or fair and reasonable rate for heat, water and refrigeration services furnished by Granada, and that these sacrificial sales of services by Granada had damaged that debtor in excess of $19,000 for which damages the respondent's account should be surcharged,[28] and the District Court so found.[29] That respondent as trustee of both Granada and Arlington, by further breach of fiduciary duty damaged Granada by paying certain valet commissions to Arlington, Inc., such commissions having been earned by Granada rental space prior to April of 1937,[30] and the District Court so found.[31] That respondent wilfully refused to pay certain current expense bills due and owing to Granada creditors, which bills were necessarily

22. PR. 75.
23. R. 420, PR. 38, Item 3.
24. PR. 76.
25. R. 420, PR. 38, Item 6.
26. PR. 76-77.
27. R. 420, PR. 38, Item 5.
28. PR. 79-80.
29. R. 420, PR. 39, Item 8; R. 419, PR. 38, par. 54.
30. PR. 80.
31. R. 420, PR. 39, Item 7.

paid by the petitioner Court Trustee[32] to secure continuance of utility and other services at the Granada Hotel, and the court so found.[33] That respondent by its neglect and in breach of its duty as trustee failed to make any effort to rent certain vacant space on street floor and adjacent to lobby of the Granada property to the damage of the debtor estate in the amount of $10,968.00,[34] and the District Court so found.[35] That the costs of the present proceedings should be assessed against respondent and the District Court so found.[36] The trial court also found as charged by the Court Trustee, that respondent by its misconduct was guilty of several other breaches of trust.[36]

Despite these findings of fact by the District Court as above recited, that court failed to enter a decree for monetary recovery by the Court Trustee, consistent with such findings. The decree of the court provided "no cash recovery to be allowed or made by these findings or decree."[37] To obtain that recovery as matter of law consistent with the findings of fact, the Court Trustee took appeal to the Seventh Circuit Court of Appeals.

Before Circuit Court of Appeals.

Your petitioner, the Court Trustee, appealed from those parts of the decree that were inconsistent with the findings of fact[38] and which denied him the cash recovery which the findings had determined was due and owing to him as the Court Trustee for the Debtor estate. The appeal so taken was docketed in the Circuit Court of Appeals as appeal 7061. This petition relates to that appeal by the Court Trustee.

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32. PR. 78.
33. R. 419, PR. 38, Par. 54.
34. PR. 70.
35. R. 420, PR. 39, Item 9.
36. R. 420, PR. 38-39.
37. R. 420, PR. 39-40, Par. 57.
38. PR. 45-46.

First will be stated the relations of this appeal and this petition, to several other appeals and petitions.

Separate Petitions Upon Other Appeals.

Respondent City National Bank and Trust Company of Chicago, took two appeals from the findings of fact and the decree, which denied it the right to fees as former trustee, and found that it had acted in breach of its fiduciary duties. The so-called "Granada Bondholders Protective Committee" and the legal firm of Defrees, Buckingham, Jones & Hoffman, joined in those appeals. Those two appeals were docketed as appeals 6986 and 7060. By a separate petition for certiorari those matters are here for review as Nos. 281-282 at October Term, 1940.

One ground of said petitions No. 281-282, is the conflict between the ruling by the Sixth Circuit, and the ruling by the Seventh Circuit, in cases listed at page 75, as to whether a Bankruptcy Court under the Bankruptcy Statute may review allowances made, or claimed to have been made, in the prior state court foreclosure proceedings.

A second ground of said petitions is the conflict between the ruling in the Seventh Circuit upholding an appeal by notice, and also granting an appeal by leave, contrary to the ruling in the cases cited at page 51 of said petition in the Second Circuit and by the Supreme Court.

A third ground of said petitions is the arbitrary misinterpretation and misuse of Rule 52 and Rule 73 (g) of the Federal Rules of Civil Procedure, and the arbitrary failure and refusal to follow Section 250 of the Chandler Act with reference to the matter of costs; which are discussed at page 50 and elsewhere in said petition.

The fourth ground of said petition is the arbitrary action of the Circuit Court of Appeals, illustrated by numerous orders and rules discussed throughout that petition, and the conduct of these appeals in the Circuit Court of Appeals, which that petition shows are denials of due process

in procedure under the Fifth Amendment to the Constitution. This fourth ground is the primary ground for that application for review. For authority see Point I at page 71 of said petitions 281-282.

Another appeal was taken by the Court Trustee from a subsequent independent decree dated June 30, 1929, which denied him a recovery against Arlington, Inc. That appeal was docketed as appeal 7086. By a separate petition for certiorari that controversy is now before the Supreme Court as No. 179 for October Term, 1940.

The Circuit Court of Appeals wrote but a single Opinion in these four appeals. (111 F. (2d) 834.) (The Opinion also disposes of a fifth appeal, which was settled and the loss was charged to respondents, as stated below at page 26.)

First Departure from Due Process by the Circuit Court of Appeals.

Failure by the Court of Appeals to heed admissions made in respondent's PLEADINGS, and to limit the review to matters not admitted but in issue, is illustrated by these comparisons.

Admissions in District Court by Respondents by Pleadings.	*Opinion by Circuit Court of Appeals on Matters Thus Admitted.*
(1) That the State Court did not approve the Accounting of City National. This is shown by the report by City National to the District Court which states (PR. 56): "* * * Your petitioner * * * represents to the court that the chancellor in said foreclosure proceedings in and by said decree expressly indicated that by the entry thereof, he did not purport to approve any account of your petitioner or successor trustee in possession of said premises * * *."	(1) "Of the amount charged by City National, the sum of $6,189.60 was also approved by the state court * * *. The state court found the amounts retained to be reasonable and approved the same by decree."[a1] and "By the decree entered in that court, December 18, 1936, the account was adjudicated and the City National was expressly authorized to apply upon the indebtedness due it."[a2]

a1. PR. 151.
a2. PR. 149.

(2) The respondents by their pleading asserted that they had the power and authority to make any alterations, repairs or improvements that should or could have been made.

At page 16 of Exhibit "A" by respondents, the Depositary Agreement April 25, 1933, reads thus:

"* * * the committee shall be fully authorized, in its discretion;

"(d) To repair or improve the Trust Property or to cause *any repairs, improvements, alterations or additions* to be made thereto; * * * *to request any such trustee or trustees to take such possession and/or engage in such operation and to exercise all other power and authority granted in Trust Indenture.* * * *"

(2) "Even if City National had deemed it expedient to make the necessary alterations, there still was a question of its power to incur the rather large expense which would have been necessary."[2a]

2a. PR. 154.

(3) Respondent in bad faith fought Federal Reorganization Proceedings because the Federal Judge indicated he would remove respondent as trustee.

Said Report by City National Bank says (PR. 62):

"* * * the court approved the petition and sought to appoint a trustee to take possession of the premises from your petitioner * * *."

(3) "In 1935, an involuntary 77B petition was filed against the debtor by three creditors, counsel for City National attacked the validity of the proceeding, and its contention was upheld by the Supreme Court. * * * Included in item VI is the sum of $4,025.29 of which $3,500 was paid as attorneys fees and the remainder as court costs incurred in that litigation which the Court Trustee here argues was without benefit to the debtor estate. This we need not determine—it is sufficient, so far as we are able to ascertain, that it was carried on in *good faith* and the charges therefore was reasonable."[c1] (Italics ours.)

c1. PR. 152.

Second Departure from Due Process by the Circuit Court of Appeals.

On June 20, 1939, this petitioner, the Court Trustee, filed in the District Court his Designation of Points for Appeal and Praecipe.[40] This praecipe did not designate the evidence. In this appeal no praecipe was filed by respondents. No praecipe or other paper was filed in this appeal by either party which designated or specified the record evidence. The evidence was not before the Court of Appeals. The pleadings, findings of fact and the decree of the District Court Judge were the record for this appeal.

Contrary to this situation the Opinion says:

> "The record is of such volume that we find it difficult to make even a summary of the situation in an Opinion of reasonable length. It is almost as difficult to obtain a clear picture of the involved issues."

If this difficulty to "obtain a clear picture of the issues involved" existed, that fact placed that Court of Appeals under the duty to affirm the findings by the District Court, as was well said in *Stevens* v. *Edwards,* 112 F. 2d 534 at 536:

> "The evidence in the record is in sharp dispute in many particulars. The court was confronted with the witnesses and had opportunity to judge of their credibility. It is the rule in federal courts and in the courts of Florida that the findings of the court upon the evidence will not be disturbed on appeal unless such findings are shown to be clearly erroneous. After a full hearing the court below determined the issues of fact adverse to the contentions of the appellant, and we are of opinion and so hold that the evidence fully supports his findings. Rules of Civil Procedure for District Courts, Rule 52, 28 U. S. C. A. following section 723c: *Markell* v. *Hilpert, Fla.,* 192 So. 392.
>
> "The judgment is affirmed."

Said Rule 52 of the General Rules of Civil Procedure reads thus:

> "Findings of fact shall not be set aside unless clearly

40. R. 511, PR. 56-47.

> erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

This is the old law rule. The former equity rule was discarded intentionally when these rules were made. This rule is the same as the statutory rule applied by this court on review of administrative proceedings. The Circuit Court of Appeals ignored the rule altogether. It assumes a power which it has not possessed. It retries the case *de novo* on scant items. It selects capriciously to reach its conclusions. Such action overturns all regular and due process of law on review. It violates the fifth amendment to the Constitution of the United States.

Furthermore as above shown, the evidence taken in the District Court was not before the Circuit Court of Appeals. The record as specified by the parties did not include the evidence. The findings by the trial judge could not be "clearly erroneous" when the evidence upon which they were based was not before the Court of Appeals for comparison with such findings. In reversing these findings the Circuit Court of Appeals departed from due process of law and ordinary appellate procedure.

The effect of the Opinion by the Circuit Court of Appeals is to rule that the record for review is not made up by praecipe or designation by the parties. The Court of Appeals asserts a power to depart from the designation by the parties, and to depart from the rules made by the Supreme Court as to framing issues upon appeals.

This petitioner without admitting that the transcript of Evidence was ever before the Court of Appeals as a record of that court, has asked (Rule 10(4) of this Court), the Clerk of that Court to transmit that unprinted transcript (which he received uncertified from the District Court) to the Clerk of the Supreme Court, so that Your Honors will have full opportunity to examine this *original* District Court record.

In the petition for certiorari No. 281-282 now pending before Your Honors at the October Term, 1940, this petitioner has shown by reasons there stated, that the record and appeals (7060 and 6986) were not adequately taken to be before the Circuit Court of Appeals, but should have been dismissed there on the motions made by present petitioner.

If it is decided that appeals 7060 and 6986 were not properly taken, and the transcript therein was not properly filed, the order for consolidation of necessity must fail. If this is so, then the only *possible* record in this appeal is the record as designated by this petitioner in his praecipe. *This record does not contain the evidence* but only the pleadings of the parties and the findings and decree of the District Court. Since the decree and the general findings are at war with the specific findings of fact, the Seventh Circuit Court of Appeals had the duty to reverse those parts of the general findings and decree that were inconsistent with the specific findings of fact. The Circuit Court of Appeals refused to perform this simple and limited duty. Such refusal was a departure from due process of law and procedure.

The constant position of this petitioner, the Court Trustee, is that the specific findings of fact are inconsistent with the general finding of fact, which denies a cash recovery to the Court Trustee; and that the special findings as a matter of law must prevail over the general, like unto a special and general verdict of a jury. The evidence upon which both the specific and general findings were based not being in the appeal record, was not before the Court of Appeals for comparison.

Order to Incorporate Record From Other Appeals Was Void for Many Reasons.

On November 4, 1939, respondents filed a motion to consolidate this appeal (7061) with two other appeals then pending (7060 and 6986) in which respondents were Appellants. This petitioner opposed that motion (PR. 125), but over that objection on November 27, 1939, the following involved order was entered by the Circuit Court of Appeals:[42]

> "It is ordered by the Court that the motion of counsel for appellees, City National Bank and Trust Company of Chicago, etc., et al., that this appeal be consolidated with consolidated appeals Nos. 6986 and 7060, that the printed transcript of record now filed in this cause be consolidated with the consolidated transcript of record filed in causes Nos. 6986 and 7060, and that the time for filing appellees' reply brief in this cause be extended to the same date on which appellants' brief will be due in causes Nos. 6986 and 7060 and that said appellants' brief so filed in causes Nos. 6986 and 7060 shall stand as appellees' reply brief in this cause, be, and it is hereby, *denied.*
>
> "It is further ordered that the transcript of evidence contained in the consolidated record in causes Nos. 6986 and 7060 be incorporated in the record in this cause, and that the said transcript of evidence need not be printed, but that it may be referred to by the parties herein.
>
> "It is further ordered that this appeal be heard on the same day as consolidated cause No. 6986 and cause No. 7060, that separate briefs be filed in each of three causes, and that not more than three hours be allowed for the hearing of the three causes, such time to be divided among counsel as they may themselves determine."

Only in this manner was any consolidation ordered.

Under this view most favorable to respondents the validity of this consolidation depends upon the validity of the other two appeals (7060 and 6986) and the validity of the record in those two appeals. THIS TRANSCRIPT REFERRED TO IN THE COURT'S ORDER WAS NEVER FILED IN THE CIRCUIT COURT OF APPEALS and as such could not properly be ordered to

be referred to by counsel, nor ordered to be incorporated with this appeal. The record mentioned by the Court was the *unprinted transcript of evidence.* (Namely the four volumes here for inspection under Rule 10(4).) They state it was not the record printed for 7060 and 6986. By a separate petition for certiorari, this petitioner has placed before Your Honors the printed record in these other two appeals. That petition and printed record is pending as No. 281-282, October Term 1940. The most that respondents claimed in those cases as to said unprinted transcript of evidence was that it had been "lodged" with the Clerk of the Circuit Court of Appeals. Thus at page 884 of the printed record in No. 281-282, we find the following statement of respondents:

> "3. Condensed and narrative statement of transcript of proceedings and summary statement of certain exhibits *lodged* with the Clerk of this Court in this cause No. 6986.
>
> "4. The following exhibits in full contained in *said transcript of proceedings heretofore lodged* with the Clerk of this Court in cause No. 7060." (Then follows a description of the transcript's Vol. I, Vol. II, and Vol. III, which had been *lodged* with the Court.) (Emphasis ours.)

This Original Transcript of Evidence Was Sent as Exhibit From Original District Court Record.

The docket of the Clerk of the Court of Appeals not only shows no filing of said *transcript of evidence,* but also fails to show that said transcript was ever even "lodged" with him or if it was so "lodged" the date of such lodgement. No filing or lodgement entry is shown by the Clerk of the Circuit Court of Appeals for said transcript, in any record in any of the appeals brought here for review. He was a mere custodian of said document, and has now transferred that custody to the Clerk of the Supreme Court. The documents in question were filed in the District Court

on December 30, 1937 and are original documents of that court. They bear no certificate to the Circuit Court of Appeals, but were sent there by a special order entered in the District Court on June 14, 1939. They are sent to this court for inspection under Rule 10(4) by a special order entered June 16, 1940 by the Court of Appeals. This petitioner submits that said four volumes were never any part of the record in the Circuit Court of Appeals.

THIRD DEPARTURE FROM DUE PROCESS BY THE CIRCUIT COURT OF APPEALS.

A. Breach of Trust by City National Bank and Trust Company of Chicago Is Ignored.

The findings by the trial court *established* that City National Bank and Trust Company of Chicago was guilty of a breach of trust by acting as trustee in possession of three competing and nearby apartment hotels, which contracted with each other[41] and that as trustee of Granada (the debtor) and Arlington, City National in breach of its trust obligations to Granada, sold the debtor's refrigeration and hot and cold water services to Arlington, below the fair and reasonable value and below the contract price.[42]

The effect of these findings is that City National represented adverse interests without disclosing that fact to

41. The finding of the District Court (R. 418, PR. 36):
"Absent a joint operation or a unit reorganization, there was an adverse financial interest between Granada and each of the other properties, because of the services rendered by the Granada property to the other hotels. Neither the attorneys, nor the committees which have an interlocking personnel, nor the City National as Trustee, could rightfully continue a common relationship to all these properties once this adverse interest was disclosed."

42. The finding of the District Court (R. 416-417, PR. 33-34):
"Instead of reorganizing three properties as a unit or resigning from two of the trusts, City National officials at the beginning of 1934 consummated a course of action which had been planned for a year, by charging off a balance of Four Thousand Eighty Dollars ($4,080) that had been regularly billed to Arlington and placed upon the Granada books of account, for the heat, hot and cold water and refrigeration services furnished by Granada during the year 1933. The charge (of which said sum is the unpaid balance) was made pursuant to the Barton contract.
"The purpose and effect of this attempted reduction was to enable the Arlington between 1933 and the present time to pay off entirely its taxes, and to leave the Granada with a tax bill about Sixty Thousand Dollars ($60,000) when these proceedings were begun. At the same time this was done, the former rate of compensation paid by Lincoln Park Manor to Granada was continued and collected without change by respondents and City National as its trustee; and is being paid today by a lessee of that hotel. This deliberate purpose to favor the Arlington, as against Granada by the reduction in charge forcibly made, is an additional breach of trust wholly without any warrant or reason and an intentional derogation from prior operation under the Barton contract with Granada as modified in 1930."

bond indenture owners of its beneficiary, Granada, and that as trustee of Granada it contracted with itself as trustee of Arlington for the purchase by Arlington of Granada's services. City National acted as both purchaser and vendor to Granada's great detriment. The respondent, City National has never justified but boldly ignores this non-disclosed representation of adverse interests.

Perhaps the reason for this omission was the certainty that to acknowledge this breach of trust, would necessarily make all contracts and transactions voidable at the option of this petitioner, the Court Trustee. By the simple expedient of omitting mention of this breach, the Court of Appeals seeks to shift the burden of proof, and to place it upon this petitioner, the Court Trustee. The petition for rehearing filed by this Court Trustee, called the attention of the Court of Appeals to this error,[43] which that court had committed.

This one fact is sufficient to require decision to sustain all the contentions made herein by the Court Trustee. *Winn* v. *Shugart* (C. C. A. 10) 112, F. (2d) 617, at 621.

B. Breach of Trust by City National by Its Attorneys.

The District Court found that one firm of attorneys had handled the Granada affairs since 1924, and had willingly represented persons as trustees who had violated

43. PR. 162.
"In the *Peacock Food Markets Case*, 108 F. (2d) 453, this Court of Appeal held that the suspicious circumstances attending the personal relationship of the parties voided the transactions involved, unless evidence should be given which would tend to prove that the motives of the parties were *honest and honorable*. In the case at bar Your Honors call upon the Court Trustee strictly to prove that each and every act of the parties (though very suspicious) was in fact the result of *dishonest and dishonorable* motives. Your Honors by the present opinion have saddled an entirely different burden of proof upon this Court Trustee, than was allotted to the Court Trustee in the *Peacock Food Markets Case*. This Court Trustee had every reason to rely upon that case in preparing his briefs at bar. Accordingly this Court Trustee respectfully inquires why such a different application of the burden of proof is announced in the case at bar. The question involved is so important that Your Honors might state the reason in the opinion."

their trust relationships.[44] That these same attorneys engaged in various litigations to protect themselves and the bankers from the consequences of their own wrongs and used Granada money to finance these litigations.[44] These findings were never contested. In Illinois the Statute of Limitation for most breaches of trust is five years (Chapter 83 Section 15). City National was in charge of Granada for five years before those federal proceedings began. By non-action it thereby had released its predecessor trustees and others; and had likewise in legal effect assumed full personal responsibility for wastage and loss to Granada estate by reason of all trusteeship prior to present federal reorganization proceedings in April, 1937. See Appendix B at page 46 below.

The District Court also found that this firm represented adverse and hostile interests without disclosing that fact to such beneficiaries, and that certain papers which were used in the trial court to evidence City National's breaches of trust, had been drawn up by those attorneys who now represented City National.[45] The District Court's

44. (R. 417, PR. 34):
"Since the Granada property was built in 1924, one set of attorneys have prepared the financial papers and have represented Chicago Trust Company, Cody Trust Company, Thuma, Wendstrand and Hall as agents and nominees for said companies, and also for Central Republic Trust Company and the Bondholders Committee for Granada property. Throughout ten years of litigation a connected purpose is shown to prevent a clearance of the property from Court entanglements. * * * Every effort has been made to pay with moneys from the debtor estate, court expenses and legal expenses for maintaining and continuing these various litigations, and to protect the bankers who initiated the bond issue and sold the bonds and attorneys from their own wrongs and mistakes." See also Appendix E at page ..... below.

45. (R. 418, PR. 36):
"City National Exhibit 'X' prepared early in 1924 provided an estimated basis of compensation between Granada Hotel and Arlington Hotel. This document was prepared by Defrees, Buckingham, Jones and Hoffman, attorneys. * * * These attorneys have represented throughout, the Bondholders Committee for Granada, the Arlington and the Lincoln Park Manor properties, and likewise the City National as Trustee of these properties.
"Absent a joint operation or a unit reorganization, there was an adverse financial interest between Granada and each of the other properties, because of the services rendered by the Granada property to the other hotels. Neither the attorneys, nor the committees which have an interlocking personnel, nor the City National as Trustee, could rightfully continue a common relationship to all these properties once this adverse interest was disclosed."

upon this basis.[49] Likewise Item 4[50] was stated not to be due this petition on the basis that the Superior Court had approved these payments.[51]

The Court of Appeals ruled[52] that the same situation controlled Item 5.[53] Item 6[54] was similarly disposed of[55] on the basis of the Superior Court decree. All of these items totaling some $44,042.93 were found by the District Court to be due to this petitioner.

An additional wrong by City National was the use of its "Bondholder's Committee" to present to the District Court and Granada owners a plan for reorganization of Granada, in which without disclosure of the facts it listed as unquestionable debts the balance of $3,000 and interest on a conditional sales contract for furniture; and the balance of $4,000 and interest on a purported Superior Court receiver's certificate. Investigation made

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49. The Opinion of the Circuit Court of Appeals, PR. 149:
"Item III, in the amount of $1,990.86, includes a number of items, the largest of which is $1,608.56. In the proceeding in the Superior Court of Cook County, referred to heretofore, an accounting was had between City National and the debtor. By the decree entered in that court December 18, 1936, the account was adjudicated, and the City National was expressly authorized to apply said sum upon the indebtedness due it. It appears to be the position of the court trustee that the order of the Superior Court was void. We conclude to the contrary and, that City National properly applied this amount to its claim as authorized by that court."

50. R. 420, PR. 38.

51. The Opinion of the Circuit Court of Appeals, PR. 150:
"The amounts of $13,000 and $7,500 charged to City National in this item were paid in conformity with the decree of the Superior Court."

52. The Opinion of the Circuit Court of Appeals, PR. 151:
"Item V. This item in the amount of $11,365.42, represents 4% of debtor's gross income charged for management. Of this amount $2,512.23 was received by the Central Republic Trust Company during its tenure as trustee, and approved by the state court. Of the amount charged by City National, the sum of $6,189.60 was also approved by the state court."

53. R. 420, PR. 38.

54. R. 420, PR. 38.

55. PR. 152:
"Item VI in the amount of $10,186.65 represents the total of a number of small items and here again no distinction is made between City National and former trustees, and the State Court proceedings are treated as invalid."

findings of fact stated that City National as trustee was under the duty to have demanded an accounting from former unfaithful fiduciaries, and that the firm of Defrees, Buckingham, Jones & Hoffman, which now represented City National had been the attorneys for these former "fiduciaries".[46] These findings are not contested in the present record. See Appendix D at page 49 below.

Even in the Circuit Court of Appeals members of this law firm represented the adverse interests of (a) City National, (b) Arlington, Inc., and (c) the "Bondholder's Committee" for Granada. And yet that court failed to take any notice of these substantial findings of fact by the trial court.

C. Accounts of the Respondent City National Were Disapproved by the State Court in the Foreclosure Proceedings, by Its Positive Order on December 18, 1936.

The Circuit Court of Appeals relied upon the state court foreclosure proceedings as central reason for reversing the findings of fact and decree by the District Court. Item 3[48] of the District Court's findings was reversed

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46. (R. 414-415, PR. 30-31):

"All of these facts were known or available to City National. The records show that the attorneys whom they now retain, have been active in all of these matters since 1924, and have had to do with most of these litigations. It does not appear that City National or anyone tried at any time to have the Codys or the Cody Trust Company or its officials, or the Chicago Trust Company, or its officials, or any successors or receivers for them, or Wendstrand and the other indemnitors on the court bonds that were released by buying the Pick furniture the second time with bondholders' money, and buying new furniture from La Salle Furniture and Supply Company when Pick & Company took away part of the furniture, to have any of these persons perform their promises and duty to the Granada property and the Granada bondholders."

48. R. 420, PR. 38.

by the Court Trustee established, and the District Court found that these items were not Granada obligations, but were Cody Trust and Chicago Trust Company obligations. (See other Granada appeal, 104 F. (2d) 528.)

Spurious Liens Put in Granada Plan.

On these spurious liens City National had been paying out Granada monies from 1933 to 1937 (during which period unpaid state tax liens doubled and no monies were paid to bondholders or stockholders of Granada). The framing of the plan and the failure to make disclosure were intended to bury this misconduct by City National, and to secure and did secure approval of the plan without disclosure to or knowledge of these real facts by the Court Trustee or owners. Inasmuch as the City National claim was reserved and continued for further hearing at the time the Granada plan was confirmed by the District Court on July 14, 1937, the liability of City National for such misrepresentation by the plan continues and remains an issue in this litigation before this court.

This is true all the more, because the Circuit Court of Appeals has ruled (104 Fed. (2d) 528) that those liens were recognized closed by the plan, so that the Court Trustee could not successfully defend against the holders of those liens; namely, the Indemnity Insurance Company of North America, and Continental Illinois National Bank and Trust Company of Chicago. After the Circuit Court of Appeals on the second appeal (111 Fed. (2d) 834 at 843) confirmed order for payment of the claim by Indemnity Insurance Company of North America on its receiver's certificate, it was useless to proceed further with the appeal against claim by Continental Illinois National Bank and Trust Company of Chicago, upon the conditional sales furniture contract. Whereupon the Court Trustee caused

those appeals to be settled with cash and satisfied, which additional loss of $10,000 is plainly due to the unfaithful conduct of City National Bank and Trust Company as accounting trustee now before this court.

The fraudulent nature of such concealment and loss is further shown by the fact that City National by its pleading now before this court[61] opposed repayment to Cody Trust and its receiver for the tax lien listed in the plan.[62] Although that tax lien, and the furniture lien, and the receiver certificate lien all arose out of the same situation by which Cody Trust was seeking to escape, from the duty it had assumed in writing to remove all liens prior to the first mortgage bonds. When City National states by its pleading that the tax lien is not collectible against Granada Estate, it admits knowledge that all these liens are debts of Cody Trust and its successors. Section 67 d 3 of the Bankruptcy Act as amended provides:

> "The remedies of the trustee for the avoidance of such transfer or obligation and of such preference shall be cumulative; provided however, that the trustee shall be entitled to only one satisfaction."

By this petition the Court Trustee seeks that satisfaction from City National Bank and Trust Company of Chicago.

The State Court Decree.

The opinion by the Circuit Court of Appeals wholly relies upon the decree in the state court proceeding to bar any inquiry by the District Court as to the disposition of the several sums involved. The question then is: *Do the admitted contents of the decree of the state court here in this record, justify this reliance which is based upon the theory of res adjudicata?*

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61. PR. 52.
62. PR. 61.

The answer must be in the negative. The state court judge expressly stated in that decree, that he did not approve or adjudicate the accounts of City National. In his own hand with ink, he had written into that decree on December 18, 1936, apt negative words as follows:[63]

> "The court by the entry of this decree does not approve the accounts of the trustee in possession (City National) of the premises involved herein."

Thus the decree of the Superior Court of Cook County (December 18, 1936) expressly disapproved and refused to accept or confirm the accounting by respondent City National with anyone. This portion of the decree was set forth *haec verba* by the Court Trustee in his *answer, counterclaim and objections* in the District Court filed on September 9, 1937.[64] The District Court found:[65]

> "By the decree December 18, 1936, the presiding judge of the Superior Court refused to allow or consider any accounting of the Funds."

The Circuit Court of Appeals omitted all mention of the words of the state court judge as placed by him in the decree, despite the fact that the substantial pleadings of the parties called it to the court's attention. The respondent in its "report and account" filed in the District Court on August 30, 1937, and sworn to by respondent City National's assistant trust officer stated:[66]

> "* * * Your petitioner (City National) * * * represents to the court that the chancellor in said foreclosure proceedings in and by said decree expressly indicate(d) that by the entry thereof, he did not purport to approve any account of your petitioner as successor trustee in possession of the said premises * * *."

This statement by the state court judge in the foreclosure decree was again called to the attention of the

63. PR. 56.
64. PR. 70.
65. R. 413, PR. 28-29.
66. PR. 56.

Court of Appeals at page 5 of the petition for rehearing[67] filed in that court by this Court Trustee.

Furthermore, by reason of nondisclosure to the bondholders (see page 21 above), the decree in the state court on December 18, 1936, would be void and not *res judicata* against the bondholders and the Court Trustee, even if the decree had been worded in the manner assumed by the learned Circuit Court of Appeals. Where such nondisclosure or fraudulent representation to a beneficiary occurs, a court of equity refuses to hear anyone who asserts such a decree against the defrauded party. *Harrigan* v. *Stone*, 230 Ill. App. 413 at 425; *Shapiro* v. *Wilgus*, 287 U. S. 348 at 356.

67. PR. 164.

FURTHER DEPARTURES FROM DUE PROCESS BY THE CIRCUIT COURT OF APPEALS.

(A) The Barton Contract.

One item[73] found to be due this petitioner from respondent by the District Court was:

> "8. City National without authority wilfully reduced and failed to collect or pay over rentals due from Arlington for inter-hotel services from January 1, 1933, $19,170.00."

The basis of this item was the Barton Contract in writing as modified in 1930. The District Court found that this contract was in force[74] and that City National as trustee of Granada and Arlington should have enforced it. The contention that the "Barton Contract" controlled the situation was set forth at page 19 of the original brief of this petitioner as filed in the Circuit Court of Appeals.

Thus the existence, validity and effect of the Barton Contract is one of the central issues of this case. *Yet at no place in the Opinion of the Circuit Court of Appeals is the existence of the Barton contract hinted.* It is not mentioned in that Opinion. This important finding of the trial court is ignored.

At page 25 above, showing is made that the sum of the items there erroneously reversed was $44,042.93. Adding the present item to this, we have a total of a least $63,212.93, due to the Court Trustee, from City National.

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73. R. 420, PR. 39.

74. Findings of Fact, R. 417, PR. 34:
"* * * This deliberate purpose to favor the Arlington, as against Granada by the reduction in charge forcibly made, is an additional breach of trust wholly without any warrant or reason and an intentional derogation from prior operation under the Barton contract with Granada as modified in 1930. That contract remains in force at this time. After trial of this suit, Arlington, Inc. has refused to receive services under said contract since December 10, 1937; Arlington, Inc. is officered and controlled by City National employees, who have done this additional wrong to Granada."

(B) The Statute of Gloucester—A Law That Controls Untrustworthy Fiduciaries: Ignored.

The bankruptcy practice applies established law to determine the amount of recovery on claim or counterclaim in bankruptcy proceedings. The extended investigations by Congress and its Committees in the early 1930's, led to some preventive federal legislation. One such law is the Trust Indenture Act of 1939. But that affects only bond issues of One Million Dollars or more. Likewise the Securities Exchange Commission Act affects only large financial transactions interstate. None of the federal laws of a preventive or regulatory nature reached down to the great mass of transactions which affect the average American citizen and business man. As before, so now, the prior law will continue to be the safeguard for the great body of citizens of this country.

Realizing that this is so, the Court Trustee in presenting this case to the District Court and to the Circuit Court of Appeals, made extensive search for prior law sufficiently strong to accomplish a protection for the average investor. He called attention to the Illinois rule, exemplified by the case of *White* v. *Sherman*, 168 Ill. 589 at 610, which has since been confirmed by the case of *Kinney* v. *Lindgren*, 373 Ill. 415 at 422; and the case of *Nonnast* v. *Northern Trust Company*, 374 Ill. affirming 300 Ill. App. 537.

These cases rule that no trustee is absolved even by a settlement signed by the beneficiary, unless he has fully made disclosure of all his transactions and all his associations in these transactions, to the beneficiary before the settlement was made; and is not entitled to fees or compensation when deception occurs. The rule does not require the beneficiary to distrust the trustee, nor to make

comprehensive search before he signs a receipt. He is not dealing with the trustee at arm's length, but the trust relationship continues unless and until the trustee has made full and complete disclosure, so as to put the beneficiary upon notice and upon guard.

In this case at bar, the Circuit Court of Appeals completely ignored the principles of Illinois law, and swept them away by its assertion that while the circumstances are suspicious, mere suspicion of the trustee is not enough. The Court of Appeals decides not only that the Illinois law is not to be regarded, but on the contrary the effect of the Circuit Court of Appeals holding is that any beneficiary or the Court Trustee, who counterclaims in bankruptcy proceedings against a former Indenture Trustee, must prove the claim beyond all reasonable doubt. In effect the Circuit Court of Appeals apply the criminal procedure rule against the beneficiary, and in favor of a former Indenture Trustee. If this be not a complete destruction of the whole history of equitable remedy, your petitioner has read all the books to no avail.

In order to show the Court of Appeals how deep-seated in established law is the duty of real estate trustee, the Court Trustee in his brief developed the history of the Act of Gloucester, which has been the law in England and in Illinois continuously since the thirteenth century. The 4th and 5th sections of the great Charter in 1215 was drawn to curb the rapacity of persons who came into control of real estate belonging to others, and especially of those who were guardians for minors and widows. At that time such guardianship was the principal form of trusteeship, and that language was comprehensive for the economic fact at that time. Later on, owing to economic change, it became desirable to widen the language of the Charter in order to effect the purpose that had been embodied in the Charter. So the Statutes of Marlebridge (52 Hen. III,

ch. 23) and Gloucester (6 Edw. I, ch. 5) were passed in 1267 and 1278 A. D. The statute of Gloucester has not been revised. It is today a workable safeguard for the common investor. It is a better remedy than any which your petitioner has been able to find in any modern book.

The said statute of Gloucester provides:

> "And he which shall be attainted of waste, shall lose the thing that he has wasted, and moreover shall recompense thrice so much as the waste shall be taxed at." (PR. 71.)

The Court of Appeals did not understand this argument. They thought it was dull. They thought that the Illinois Statute which was passed when the state came into being in 1818, which continued as a part of the law of Illinois, the common law of England and all British Statutes applicable to the conditions of this country; was not sufficiently interesting to be worthy of discussion in their Opinion.

The brief for the Court Trustee in the Court of Appeals collected many decisions from many of the American States, confirming and applying the Act of Gloucester to American conditions, as part of the common law and as part of the law adopted by similar statutes of other states than Illinois. The brief also listed triple damage statutes dealing with non-fiduciary affairs, which had been adopted not only by the Federal Government, but by a great many of the separate states of the United States. In some states there are as many as thirty separate statutes providing for triple damages. The principle of triple damage was demonstrated to be not an obsolete policy, but a legislative practice used with increasing frequency during the recent one hundred years in Illinois and throughout the United States. It was shown by the brief to be a sound corrective and redress for civil wrongs.

All of this was only dull in the Opinion of the Cir-

cuit Court of Appeals. The result of their Opinion is, that the American investor is foolish to invest; is shorn by foreclosure; is shorn again by reorganizers; and is shorn a third time by Courts of Review. The latter reverse the trial courts who are in the thick of the circumstances shown by direct contact with the record and the witnesses. The Court Trustee submits that such drastic indifference by a Court of Review requires intervention and directions to be given by this court, in order that elementary justice may prevail.

Denial of Due Process Under the Fifth Amendment.

The Court Trustee on behalf of more than 400 widely scattered owners of the bonds, issued in 1928 upon the security of the Granada Hotel Property which was brought into the District Court by two petitions to reorganize the debtor, respectfully says that there has been a denial of due process in the proceedings in the Circuit Court of Appeals, as shown throughout this petition.

The Opinion by the Circuit Court of Appeals states that the claims and the amounts thereof made by the Appellants are *res adjudicata* in favor of respondents by reason of the decree of December 18, 1936, which was entered in the State Court proceedings, in the Superior Court of Cook County, Illinois. That statement is directly contrary to the decree itself, which is part of the record before the Circuit Court of Appeals and before this court. That decree is *res judicata* against respondents making any claim against the debtor or the Court Trustee.

Bank of America, et al. v. *Jorjorian,* 303 Ill. App. 184, 24 N. E. (2a) 896 and 897.

Said bond owners did not know of said foreclosure proceedings, and were not summoned into the same. Whereby all attempt to appoint City National Bank and

Trust Company as a Successor Trustee was void as to them, and thereby the attempt to create fees for the committee and for the attorneys was equally without a record foundation as against said bondholders. *Sanders Estate*, 304 Ill. App. 57, 25 N. E. (2d) 929. Said bondholders for the first time have an independent representation when the matter comes before the District Court in the reorganization proceedings, wherein present petitioner became Court Trustee. This is the present litigation.

As to said bondholders for whom the Court Trustee is now petitioner, there is no evidence in this record, and none was offered in the District Court, as to the services claimed by City National Bank in relation to the Superior Court proceedings. The pleading in the District Court relies only upon the claim asserted to have been allowed by the Superior Court decree. When that decree was produced it shows that the claim was not allowed, but on the contrary there was express refusal by the Superior Court to allow the same. There is no pleading nor evidence in present record in bankruptcy from which the District Court or any Court of Review can determine the nature, or the extent, or the value, or the services for which recovery is sought on behalf of City National Bank and Trust Company, its committee and its lawyers.

The fact is evident that by this Opinion the Court of Appeals has not only abandoned all the procedural limitations, which limit the subject matter of review; but has in addition broken down all the recognized substantive relationships; so that confidential situations are no longer any protection. Long after the fact and sometime after trial and decree, the court of review says that parties, whatever their confidential trust relationships, must meet in that court, the requirements which heretofore was applied only in competitive struggle to persons dealing at arm's length.

THE PRINCIPAL QUESTIONS PRESENTED.

May a United States Circuit Court of Appeals Deliver an Opinion Which Arbitrarily and Capriciously Omits or Misstates Undisputed Facts and Ignores Settled Principles of Law or Must it, in Its Disposition of an Appeal, Conform With the Fifth Amendment and Decide the Case According to Due Process of Law,—Giving Full Notice and Hearing?

At various places in this petition many *departures* from due process of law are shown to have been committed by the Circuit Court of Appeals for the Seventh Circuit. These "departures" may be restated as follows:

First Departure

Page 13

The refusal of the Court of Appeals to heed the important admissions of respondents' pleadings.

Second Departure

Page 15

(1) The failure of the court of appeals to obey Rule 52 of the Rules of Civil Procedure as shown by the court's reversal of the District Court's findings of fact.

(2) The refusal of the Court of Appeals to limit the record to the material specified by the praecipe or designation of the parties.

(3) The order of the Court of Appeals consolidating this appeal with two other appeals which had been so improperly taken by respondents as to not confer jurisdiction of the Appeal Court over those appeals.

(4) The order of the Court of Appeals allowing reference by the parties in this appeal to an alleged unprinted original "transcript of record" in another appeal *which record had not at any time been filed in any appeal with the Clerk of the Circuit Court of Appeals* and which respondents themselves only claimed to have been *"lodged"* with that clerk al-

though the clerk's docket does not show that such record had been even lodged with him.

Third Departure

Page 21

(1) The failure of the Court of Appeals to place the burden of proof upon respondents who although having acted in breach of trust by reason of undisclosed representation of adverse interests have never sought to justify or "explain" their posititon. (City National was trustee for both Granada and Arlington and as such "sold" services to itself.)

(2) The failure of the Court of Appeals to even note that the attorneys for respondents had likewise engaged themselves in adverse representations without disclosure. See Appendix E at pages ..... below.

(3) The wilful refusal of the Court of Appeals to heed the admissions made by respondents that their accounts had never been approved by the state court and the reversal of the findings of the District Court in that regard.

Further Departures

Page 30

(a) The refusal of the Court of Appeals to mention or heed the finding of the trial court that the inter-hotel service sale was governed by the Barton Contract.

(b) The refusal of the Court of Appeals to apply the law of Illinois and of the United States regarding the assessment of treble damages in cases of waste as is provided for by the Statute of Gloucester.

Thus is submitted the basis for petitioner's contention that the opinion in this case rendered was capricious and arbitrary, omitting and misstating as it does confessed facts, ignoring and refusing as it does to be governed by settled principles and applications of law. One fact more than any other shows the extent to which this Court of Appeals went in its denial of due process of law,—the length to which it went in its denial of fundamental and usual procedure. That fact is pointed out herein at Second Departure (4) just above. The court ordered that

the parties SHOULD REFER TO A RECORD WHICH WAS NEVER FILED AND WHICH ITSELF SHOWS WAS NOT FILED ON APPEAL WITH THE COURT. All this despite the fact that another and different record had been properly filed by this petitioner as the sufficient record on appeal. The fifth amendment was and is intended to operate to prevent such a denial of due process as this. It is and was intended to prevent a denial of notice and hearing. It is and was intended to prevent a court from deciding a case upon new suprise issues to the exclusion of those issues upon which the case had been decided by a trial court.

Your Honors in three principal cases have so decided. These cases are:

1. *Postal Telegraph Cable Co.* v. *City of Newport,* 247 U. S. 464.
2. *Saunders* v. *Shaw,* 244 U. S. 317.
3. *Lutcher & Moore Lumber Co.* v. *Knight,* 217 U. S. 257.

This petitioner respectfully submits that under the record as herein shown it becomes the duty of the Supreme Court to make secure the application of due process of law to a party to whom such fundamental justice was denied by the Circuit Court of Appeals for the Seventh Circuit.

IN CONCLUSION.

The method or technique used by the lawyers respondent, for themselves and the other respondents since 1924 in dealing with the Granada affairs, continually has been to expand and balloon the conduct and the statement and the court presentation of each transaction, so that whatever really is simple appears to be complex and confusing. The District Court (who made direct examination of all the Exhibits and heard directly in open court all the witnesses, and personally interrogated many of them) so found and declared by findings. What the respondents primarily sought to do, was to keep control over Granada affairs

indefinitely and to pay, from the revenues, the expenses of the control and of keeping control, without at any time reporting directly to the owners of the property, and without at any time asking authority to be employed or to continue their management. In various proceedings in the state courts and in two former proceedings in the Federal Courts, which were carried eventually to the Supreme Court, the respondents succeeded in mystifying the courts with complicated records and plausible objectives. None of said proceedings ever produced any valuable result for owners of Granada. On the contrary they have had no payments of principal or interest since 1931. Beginning in 1932 the earnings were segregated and wasted and disbursed for purposes selected by the respondents. The respondents had complete control and charge of the management and income from the property from 1932 until the present proceedings began in the United States District Court April 1937.

When petitioner was appointed Court Trustee in these proceedings May 17, 1937, respondent City National, and respondent attorneys, filed a jurisdictional objection to the proceedings, and announced their unwillingness to submit the control of the property or its management to the Federal Court. They continued jurisdictional objection by carrying away from the property some of the income after your petitioner was appointed, and have refused to this date to restore that property carried away after your petitioner was so appointed.

Although the prior foreclosure proceedings in the state court were filed in June 1930, as a partial foreclosure on second mortgage interest coupons, and became a crossbill on August 7, 1933, a full-fledged foreclosure upon the first mortgage bonds and coupons, the decree was not presented by respondents until December 18, 1936. Even then at the end of 78 months the chancellor in that court was so dis-

satisfied with the conduct of the respondents, that he declined to enter the decree recommended by the Master, and wrote express language with a pen into the proposed decree, which left the respondents without any approval of their acts and transactions in management of the income and finances of the Granada property.

When the Court Trustee was appointed, he at once asked personally and in writing, the respondents and a great many other people to turn over to him all property and money, and particularly all documents pertaining to Granada affairs. In view of the fact that respondents later in October 1937, produced and offered as Exhibits most of the documents in evidence in these proceedings, and in view of the fact that nearly all of said documents have covers bearing printed names of one or more of respondents upon them, it is obvious that the respondents could have furnished to the Court Trustee in May and June of 1937, said documents or copies of them. And it is a fair inference that they still have other documents, by reason of the fact that said lawyers have been directing Granada affairs much of the time since 1924.

When witnesses for the committee and City National were asked in the District Court why they had not turned over documents upon the demand of the Court Trustee, they stated that all documents were in the hands of the lawyers, and that they had none. When the lawyer partner who testified voluntarily, was asked why the documents were not turned over to the Court Trustee pursuant to the order of court dated May 17, 1937, he stated that his office kept no documents, that these lawyers returned them to the clients as soon as any transaction was finished.

If a fair number of the documents pertaining to Granada affairs had been turned over by the respondents to the Court Trustee in May or June 1937, the size of the present record would be very much smaller than what it is, and the

month devoted by the District Court in hearing this case would have been reduced to two or three days. Under said circumstances, it was only by the kind of the hearing which was had that the necessary documents could be obtained, and the necessary facts brought out to inform the court, and to enable the findings of the decree which the District Court entered.

When a Court of Appeals succumbs to a voluminous record (as the Opinion so states, PR. 145) which was made voluminous by the misconduct of respondents, the whole purpose of having Federal Reorganization is defeated. As above shown, the state court after 78 months was too weary to find out the facts hidden behind the voluminous record in that court. Now if the Supreme Court will not review the similar surrender by the Court of Appeals to a voluminous record, and will allow that court without any analysis of the record to strike down the critical and careful investigation of all the facts made and reduced to record by the District Court, the vicious practice of reorganizers who pretend to be fiduciaries will be given permanent judicial sanction. Such unfaithful reorganizers may go their way, hiding the important central facts behind enormous records which they make as smokescreens to prevent the owners of property from finding out the truth, and to prevent courts from restoring properties to those who own them.

The conduct of respondents in the Court of Appeals in the present litigation is a continuation of the methods they have used for 10 years to prevent factual discovery and a prompt decision of issues adversely presented. Respondents took a double appeal and filed endless motions with the effect of wearying the Court of Appeals with the case. Most of the material which respondents placed in the record in the District Court has been ignored by them in any later argument. Most of the matters assigned by them in the

Circuit Court of Appeals as errors they have since abandoned, but they did have in the Court of Appeals a record so expanded that that court failed to give it analysis. The ballooning of records and pleadings, and the manipulation of the proceedings by the respondents were successful in the Court of Appeals, as they have generally been for 10 years in hiding the few simple issues in masses of chaff.

If any individual lawyer practicing alone should attempt such use of court process, he would be disciplined. But commercial firm names behind which individual lawyers operate, have a magic prestige that enable such things to be done, not only in state trial courts but in some Federal Courts of Review. In the case at bar the record shows rank violation of fiduciary duties persisted in for years with impunity, and successfully buried by a brazen "what of it" in a court of appeals.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

The Circuit Court of Appeals ordered that the parties might refer to a "transcript of record" which Respondents claimed was "lodged" but which had never been filed with the Clerk of that court. Said order was such a departure from ordinary and expected appeal procedure as to be a denial of an appeal under established rules, and amounts to a substantial denial of Due Process of Law under the Fifth Amendment to the Constitution. (Second Departure, page 19 and Principal Questions Presented I, page 36.)

The Opinion by the Circuit Court of Appeals shows that the court reached its determination by considering matters not of record before it, *i.e.*, by referring either (1) to an *unprinted* original "transcript of record" (supposedly

incorporated from another case) which has never been filed with the Circuit Court of Appeals or (2) to a "record" *printed* in another appeal case which printed record had never been incorporated, by order or otherwise, into the appeal at bar and to which the party litigants, by order or otherwise, had never been given leave to refer. Either of these methods is a denial of due process of law as guaranteed by the Fifth Amendment to the Constitution. (Second Departure, page 19.)

The Circuit Court of Appeals in violation of Rule 52 of the Rules of Civil Procedure reversed and overruled the substantial findings of fact made by the District Court, without having analyzed the evidence upon which the findings were made. (Departures from due process by the Circuit Court of Appeals.)

Many of the findings of fact made by the District Court upon hearing in open court without a reference, which are ignored, not mentioned nor discussed in the Opinion as rendered by the Circuit Court of Appeals, are reversed arbitrarily by a "blanket" order. (Departures from due process by the Circuit Court of Appeals.)

Despite the breaches of trust and the representation of adverse interests by respondent, City National Bank & Trust Company, its Bondholders' Committee and their counsel, the Court of Appeals failed to rest the burden of proof upon said respondents, which failure was a denial of due process of law under the Fifth Amendment to the Constitution of the United States. (Page 21, Breach of Trust by City National.)

The Opinion by the Circuit Court of Appeals reverses all findings of fact made by the trial court including those which were uncontested by pleadings or proofs. Such reversal is a denial of due process of law under the Fifth Amendment to the Constitution of the United States. (Page 13, First Departure.)

The Circuit Court of Appeals capriciously misread and misstated the decree of the state court as entered in the foreclosure proceedings fundamentally changing and perverting its meaning and effect, in violation of the due process of law guaranteed this petitioner under the fifth amendment to the Constitution of the United States. (Page 24.)

The action of the Circuit Court of Appeals rewards double dealing and adverse representation by trustees, counsel and bondholders' committees to such an extent as to violate the purpose and intention of the Congress of the United States as evidenced by many sections of the Chandler Act.

The Circuit Court of Appeals failed to assess triple damages against the unfaithful trustee, now respondent, City National, for its waste and neglect while in possession of the Granada property as Trustee. This is legislation; a repeal of the British Statute of Gloucester, which by clear language of the National Constitution, and by Statute of Illinois, dated 1819, remains in force in that state. The Court of Appeals also erred in failing to apply other local applicable law. (Points and Authorities, p. 51.)

Prayer For Relief.

WHEREFORE, petitioner prays the allowance of a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, to the end that the cause herein may be reviewed and decided by this court, and that the decree and orders herein by said Circuit Court of Appeals may be reversed, and for such relief as to this court may seem meet.

WEIGHTSTILL WOODS,
Attorney for Petitioner.